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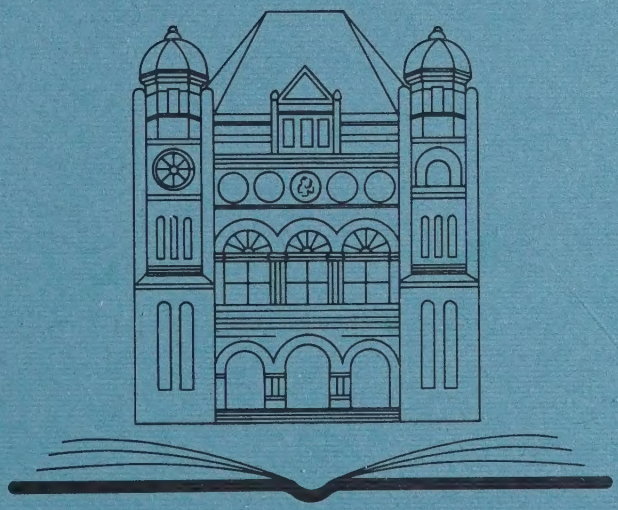
ABORIGINAL SELF-GOVERNMENT



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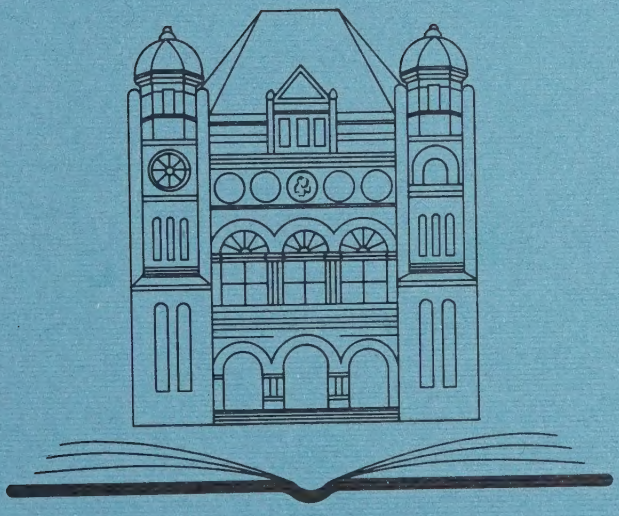

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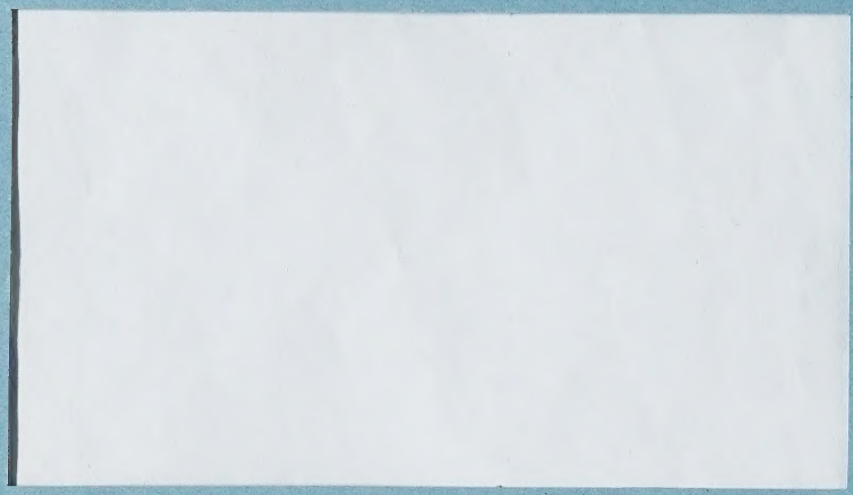

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ABORIGINAL SELF-GOVERNMENT

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CONTENTS

INTRODUCTION

Since the patriation of the Canadian Constitution in 1982, constitutional recognition of their inherent right to self-government has been a priority of Aboriginal people in this country. With the October 1992 referendum and the failure of the proposed Charlottetown constitutional amendments, this goal has been pursued through administrative action and political mobilization, rather than formal multilateral negotiation. This paper provides background on the issue of self-government and a brief overview of the current situation.

CONSTITUTIONAL APPROACH TO SELF-GOVERNMENT

Under the *Constitution Act, 1867* (the *British North America Act*), the federal government was responsible for "Indians and lands reserved for the Indians;" a later Supreme Court decision ruled that this provision included the Inuit. Federal policy towards Aboriginal people in Canada evolved over the next century, but the basic legal regime under which Indians and governments operated remained essentially unchanged. "Status" Indian people (those recognized as Indian by the federal government) had a specific type of relationship with the federal Crown, which was responsible for their health care, education and other services provided to other Canadians by provincial governments. Their lands (the reserves), government (the band system), and even identity as Indians (status), are governed by the *Indian Act*, federal legislation which was last substantially revised in 1951.

The *Constitution Act, 1982* , however, had a number of provisions addressing Aboriginal people. The most important was s. 35, which recognizes the "existing aboriginal and treaty rights of the aboriginal peoples of Canada," defined as the Indian, Inuit and Métis peoples. Section 25 provides that nothing in the *Charter of Rights and Freedoms* would abrogate or derogate from aboriginal or treaty rights and freedoms. Section 35 required calling a constitutional conference by July 1983 to discuss aboriginal matters, to include representatives of aboriginal peoples in Canada. This launched a process of aboriginal constitutional conferences that lasted for four years, and brought the issue of self-government to the top of the aboriginal legal agenda.

Aboriginal Constitutional Conferences

A meeting in March 1983 among the federal government, the provinces with the exception of Quebec, and representatives of four national Aboriginal groups resulted in agreement on a number of new sections in the Constitution and amendments to existing sections:

- Section 35.1 of the *Constitution Act*, which provides for consultations with aboriginal representatives before any changes to constitutional provisions relevant to aboriginal people is made.
- Section 37.1, which provided that at least three constitutional conferences would take place between 1983 and 1987 to discuss "constitutional matters that directly affect the aboriginal peoples of Canada."
- Amendments to section 35: these specified that rights acquired through land claims agreements are included within "treaty rights", and that existing Aboriginal and treaty rights are guaranteed equally to men and women.

The additional conferences were held in 1984, 1985 and 1987 but reached no conclusions as to constitutional change. However, over the course of these meetings, representatives of Aboriginal peoples became convinced that only an entrenched and absolute right of self-government within the Canadian federation would protect them from legislative and administrative actions eroding rights won through negotiation. Soon after the failure of the last of the Aboriginal constitutional conferences, the Meech Lake Agreement was reached among the First Ministers, at meetings held without Aboriginal representation. This convinced many observers that Canadian governments were not committed to developing Aboriginal self-government.

The Charlottetown Process

Three years later, Elijah Harper, an Aboriginal MLA, blocked the acceptance of the Meech Lake Agreement in the Manitoba Legislature and received public support for his actions. This assured a more important role for Aboriginal issues in the next round of constitutional negotiations. In the event, four Aboriginal organizations had full standing at the multilateral negotiations that led to the Charlottetown Accord of August 1992.

- the Assembly of First Nations, representing status Indians;
- the Inuit Tapirisat of Canada, representing the Inuit;
- the Native Council of Canada, representing non-status Indians; and
- the Métis National Council, representing descendants of the western Métis and based in the Prairies, but with regional organizations in other provinces and the Northwest Territories

Each of these organizations conducted extensive consultations with its own constituency on constitutional issues. The Native Women's Association of Canada tried to obtain standing at the constitutional conferences but was unable to do so.

By April 1992, over the course of multilateral discussions (involving the four organizations, the federal and territorial governments and all provincial

governments except Quebec), all parties had agreed that the Constitution should recognize an inherent Aboriginal right to self-government. The *Consensus Report on the Constitution*, the agreement reached by all governments later that year, addressed a series of other issues. Those of particular relevance to self-government included:

- a detailed process was to be followed for the negotiation of self-government agreements;
- agreement was reached that specific constitutional provisions on land and self-government would not add to or derogate from existing Aboriginal or treaty rights to land;
- section 91(24) of the *Constitution Act, 1867* was to be amended to ensure that it applies to all Aboriginal peoples (including Métis and non-status Indian people); and
- a clause was to be included in the Constitution that would provide a context for the interpretation of treaties and treaty rights (a particular concern for status Indian people in Ontario and in the Prairies).

Ontario Position

Ontario was one of the strongest advocates of enshrining the inherent right of self-government in the Constitution through this process. In the summer of 1991, the province reached an agreement, the Statement of Political Relationship, with the Chiefs of Ontario. This statement recognized the inherent right; committed the government to implementing this right via treaties, constitutional and legislative reform, and agreements; and declared the existence of a "government-to-government" relationship between Ontario and the First Nations of the province.

SELF-GOVERNMENT SINCE CHARLOTTETOWN

A poll taken soon after the October 1992 referendum found that only 4% of Canadians outside Quebec had voted against the Accord because it "gave too much to aboriginals" -- in comparison, 8% said they had voted no because they opposed Brian Mulroney, and 27% because "Quebec got too much."[1] A more analytical poll taken around the same time obtained similar results, though it found a strong correlation between voting no and opposition to the Aboriginal self-government provisions of the Accord. The same poll also found that many Westerners who voted for the Accord did so because they believed it met Aboriginal concerns (central Canadians were not asked this question). Whatever the exact findings of the polls, there is general agreement that the referendum was not lost on the issue of Aboriginal self-government (except possibly among Aboriginal people, many of whom felt that it did not

[1] "The Meaning of No," *Maclean's*, 2 November 1992, p. 17.

go far enough or threatened existing treaty rights). The possibility of proceeding on Aboriginal self-government by means other than formal constitutional negotiation was therefore left open.

This sets the stage for the main change since the defeat of the Charlottetown Accord, the federal recognition of the inherent right of self-government. The Liberal Party's 1993 federal election platform promised that the new government would act on the premise that the inherent right of self-government is an existing right within section 35 of the Constitution. This avoids the necessity of Constitutional revision, and allows the government to negotiate self-government arrangements with individual First Nations or on a regional basis without having to reach a national consensus on a more abstract definition of self-government.

The federal government has taken other relevant actions since October 1992:

- the passage of the *First Nations' Chartered Lands Act* in 1993: this Act, drafted by First Nations leaders, allows bands to avoid *Indian Act* restrictions on the management of reserve land;
- the Manitoba devolution initiative, discussed below;
- other specific initiatives, such as the agreement to transfer responsibility for Indian education to Micmac First Nations in Nova Scotia, announced earlier this year; and
- the release of a policy guide in 1995 which lays out the type of self-government agreements the federal government will consider and the process for such negotiations.

Existing Self-Government Arrangements

Though the process of developing a universal definition of Aboriginal self-government and enshrining it in the Constitution has been inconclusive, many Aboriginal people around the country have forms of government which have more power and autonomy than band government under the *Indian Act*. In addition, the pursuit of self-government via greater control of spending programs and autonomy from the Department of Indian Affairs, has a longer history than constitutional negotiations, dating from the 1972 publication of *Indian Control of Indian Education*, by the National Indian Brotherhood (predecessor of the Assembly of First Nations).

Legislated Self-Government

Quebec

Under the James Bay and Northern Quebec Agreement and successor agreements, the federal and Quebec governments established a regime of land

tenure which is more flexible than the reserve system. The existing band councils were abolished and corporations were established. These corporations have the power to make by-laws in a series of fields (health, public order, land use, environmental protection, etc.), though the federal Cabinet must approve by-laws in some of these areas. By contrast, any by-law passed by a band council under the *Indian Act* can be disallowed by the federal Cabinet, so the James Bay corporations have substantially more autonomy than band councils do.

British Columbia

The Sechelt band on the B.C. coast negotiated an arrangement with the federal and B.C. governments providing it with many of the powers of a municipality. The agreement, enshrined in federal legislation in 1986, transferred direct ownership of the reserve's land to the Band Council, as well as delegating legislative jurisdiction over 21 enumerated fields to it. The Sechelt Band negotiated independently with the provincial government; a 1988 provincial law recognizes the District Council as the governing body of the Sechelt Indian Government District, with law-making authority equivalent to a municipality.

The Territories

The federal government has signed an umbrella self-government agreement with the Council for Yukon Indians, enshrined in the *Yukon First Nations Self-Government Act*, and four communities have established self-government agreements under that 1995 legislation. Also in the north, an agreement was reached in 1993 settling the Inuit claim to lands in their traditional territory and agreeing to the boundaries of the new Territory of Nunavut, created out of what is now the eastern and far northern parts of the Northwest Territories. This territory, which will be established in 1999, will be in effect an Aboriginal government, since Inuit people make up the vast majority of the population of the area.

Administrative Arrangements

A number of First Nations and regional organizations of First Nations around the country are seeking greater administrative autonomy from the federal government and/or provincial governments. As noted above, this is a process that started in the 1970s with the proposals in *Indian Control of Indian Education*, when individual bands set up their own schools to avoid both the notorious residential school system and some of the problems created by purchasing services from local school boards. First Nations have gradually taken over program responsibilities from the Department of Indian Affairs in the fields of child welfare, health, housing and social assistance as well as education. However, funds still come from the Department, which oversees

spending on particular programs within the constraints of the *Indian Act.* This approach is now developing into a more complete devolution of responsibility from the federal department to the First Nations. The Manitoba initiative is the best-known example of this development.

The initiative was signed by the Assembly of Manitoba Chiefs and the Minister of Indian Affairs in December 1994. The federal government agreed to dismantle the Department of Indian Affairs as it affects First Nations in Manitoba, develop structures in Manitoba such that First Nations can legally exercise the authority to deliver programs to First Nations people, and restore to First Nations the jurisdictions currently held by the federal department. Under the framework agreement, three areas were to be fast-tracked: education, fire safety and capital management. Negotiations started in April 1996 (there was a delay in appointing negotiators), and the fire safety file was expanded to cover all environmental management. Substantive results can be expected on these three areas soon, possibly including the establishment of a First Nations Education Board. Two other areas, child and family care and an Aboriginal justice system, may be added to the fast-tracked negotiations.[2]

Ontario Actions

The province of Ontario has self-government agreements on specific issues with many First Nations. These actions built on other existing frameworks, most notably the 1991 Statement of Political Relationship and the 1986 self-government agreement between the province and the Nishnawbe-Aski Nation (a number of First Nations in the James Bay and Hudson Bay area, who had been signatories to Treaty 9). These agreements include:

- the establishment in 1987 of three Native child welfare agencies in Northern Ontario;
- a Native Child Welfare Agreement for the Akwesasne First Nation, which was signed in 1986;
- the establishment of the Nishnawbe-Aski Nation Legal Services Corporation in 1990 and Aboriginal Legal Services in Toronto in 1992 (the latter serves urban Aboriginal people, an important precedent for self-government institutions off reserves);
- the establishment of two community-based justice programs in Attawapiskat and Sandy Lake and two similar programs operated by the Ontario Metis Aboriginal Association;
- extensive First Nations Policing Agreements, building on a program which was launched in 1975 and extended in 1989; and

[2] Telephone conversation with Gilbert Savard, Communications, Manitoba Regional Office, Department of Indian Affairs and Northern Development, 16 July 1996.

- a June 1994 agreement with the Whitefish Bay First Nation on a consultation process before launching major activities on surrounding provincial Crown lands.

Current Ontario Policy

In March 1996, the Conservative government released its *Aboriginal Policy Framework*. This document marks a major change in the province's approach to self-government, in that it makes economic development on First Nations land the main priority of the province's Aboriginal policy. Regarding self-government, the Framework states that "the federal government must take the lead on Aboriginal self-government matters as the senior government with responsibility for Aboriginal peoples." The province will continue to respect existing Aboriginal and treaty rights and is reviewing relevant Supreme Court decisions regarding the inherent right to self-government with a view to developing a policy on self-government. This more detailed policy position has not yet been released, but it is clear from the policy framework that economic development is a higher policy priority for the Harris government.